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Jeffrey Bone

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## **A CASE STUDY ON THE LEGAL IMPACTS OF CORPORATE SUSTAINABILITY PLEDGES IN THE ALBERTA OIL SANDS**

Jeffrey Bone\*

### **ABSTRACT**

Suncor Energy Inc. is Canada's largest oil and gas producer with significant operations in the Alberta oil sands. In its 2010 Sustainability Report, the corporation made several long-term environmental pledges. This paper confronts a hypothetical situation involving these environmental pledges. What if Suncor's commitments prove to be effective from an environmental standpoint, but they become more costly from a financial perspective than Suncor anticipates? In accordance with their statutory fiduciary duties, Suncor directors have a choice to make between two options. First, the company could increase or maintain expenditures in order to meet these commitments. Second, the company could limit its projected expenditures with the consequence that environmental commitments will not be met due in part to financial constraints. This case study applies Canadian corporate statutory fiduciary duties to these alternatives and ultimately finds that such pledges do not create legal liability for directors when they fail to uphold environmental commitments. However, directors may be entitled to follow through on voluntary environmental pledges that are more costly than initially anticipated without incurring liability from disgruntled shareholders.

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## 1. INTRODUCTION

In recent years, the Government of Canada has encouraged Canadian businesses to make environmental sustainability a priority.<sup>1</sup> This is at least one reason why the natural resource sector has embraced environmental rhetoric. For example, the terms *sustainability* and *sustainable development* are commonly bandied about in the resource and energy industry.

The “genesis of sustainability was the recognition of increasingly serious and global environmental and socio-economic problems resulting from development.”<sup>2</sup> In 1987, the Brundtland Commission prepared a report on behalf of the United Nations that gave “sustainable development” its classic definition: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>3</sup>

In the Canadian context, sustainability favours a shift from continued incremental degradation of unsustainable practices to gradual recovery through economic and technological efficiencies and greater ecological rehabilitation.<sup>4</sup> At the international level, implementing sustainable development was the focus of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, also known as the Earth Summit. Several key documents came out of the Earth Summit: the Rio Declaration, a statement of general principles needed to achieve sustainable development, and Agenda 21, a global, national, and local action plan.

The terms “sustainable development” and “responsible development” are also seen in the statements, policies, codes, and regulatory disclosure documents of energy sector corporations such as Shell Canada Ltd., Nexen Inc. (wholly foreign-owned by CNOOC Ltd.), and Suncor Energy Inc., among others. For example, Shell states that “sustainable development” is an integral part of the energy business.<sup>5</sup> Nexen defines “responsible development” as supplying energy “without compromising the well-being of future generations.”<sup>6</sup> Suncor’s literature suggests the company conducts its “operations and growth plans in a way that enhances social and economic benefits, while striving to minimize the environmental impact associated with development.”<sup>7</sup> This language has appeared verbatim in Suncor’s annual sustainability report for the past several years.<sup>8</sup>

<sup>1</sup> See Foreign Affairs, Trade and Development Canada, “Sustainable Development Strategy 2007-2009” (2009), online: Foreign Affairs, Trade and Development Canada <<http://www.acdi-cida.gc.ca>>.

<sup>2</sup> Shawn Denstedt, JoAnn Jamieson & Matthew Keen, *Sustainable Development and Environmental Assessment Processes* (Discussion Paper) (Calgary: Osler, Hoskin & Harcourt LLP, 2008) at 1.

<sup>3</sup> *Brundtland Report: Report of the World Commission on Environment and Development, Our Common Future* (Oxford: Oxford University Press, 1987) at 43. Named for the Commission’s Chair, Dr. Gro Harlem Brundtland, former Prime Minister of Norway.

<sup>4</sup> See Robert Gibson, “Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the Canadian Environmental Assessment Act” (2001) 10 J Envtl L & Prac 39 at 42.

<sup>5</sup> Shell Canada Ltd, “Environment & Society” (2013), online: Shell at <<http://www.shell.ca>>.

<sup>6</sup> Nexen Inc, “Sustainability Report 2012” (2013), online: Nexen <<http://www.nexeninc.com>>.

<sup>7</sup> Suncor Energy Inc, “Sustainability” (2013), online: Suncor Energy <<http://www.suncor.com>>.

<sup>8</sup> *Ibid.* Also see the 2010 *Report on Sustainability* (21 July 2010), online: Suncor Energy Inc. <<http://sustainability.suncor.com>> [2010 *Report on Sustainability*]. The Suncor Sustainability Report was developed using the Global Reporting Initiative (GRI) G3 Guidelines and reached an A+ reporting level. Note the latest version of the GRI Guidelines is currently G3.1. Global Reporting Initiative, “GRI Sustainability Reporting Guidelines G3.1 – Reference Sheet” (3 January 2014), online: GRI

The following paper discusses the potential liability flowing from the future-orientated pledges made in Suncor's 2010 Report on Sustainability, while keeping in mind corporate directors' statutory fiduciary duties contained in section 122(1) of the *Canada Business Corporations Act (CBCA)*.<sup>9</sup> I argue that corporate directors do not have a duty to consider (or not consider) environmental interests. However, the directors of Suncor have a solid legal basis to defend a voluntary sustainability policy even if there is no duty that requires it.<sup>10</sup>

Using this framework, Part 1 examines whether corporate stakeholders can enforce the covenants contained in a sustainability or environmental pledge if it negatively impacts shareholder profit using the example of a Canadian energy company. To this end, the case study considers the long-term pledges contained in the 2010 Report on Sustainability of Suncor Energy Inc. and legal regulations concerning reclamation of tailings in the Alberta oil sands.

Part 2 sets out the leading legislation and case law on corporate directors' fiduciary duties in Canada. Important issues arising from the case law include the application of corporate citizenship and the business judgment rule as a potential mechanism to shield directors from liability when making strategic decisions based on environmental factors.

Part 3 applies the previous part's conclusions to the case study. The focus is on the legal obligations, if any, that attach to directors of Suncor in relation to their 2010 Report on Sustainability. The Suncor case study demonstrates that corporate sustainability pledges do not create legal liability for directors when considering their fiduciary duties contained in section 122(1) of the *CBCA*. Directors acting on behalf of a corporation may follow through on an environmental pledge or ignore it without incurring liability.

## Case Study Framework

Corporate sustainability pledges include all forms of environmental covenants, promises, and undertakings.<sup>11</sup> There is a contradiction in considering whether a voluntary pledge can be legally enforced since it is settled law that a naked promise, without more, is not legally binding. However, this case study explores whether corporate directors can be held legally responsible through their fiduciary duties for voluntary sustainability pledges enacted by the corporation.

Suncor made several of these voluntary pledges in its Sustainability Report, including a pledge to accelerate the reclamation of Suncor tailings through a new, internally-

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<<https://www.globalreporting.org/resourcelibrary/G3.1-Quick-Reference-Sheet.pdf>>. Further, Suncor uses the non-profit group Ceres for input in preparing its sustainability report:

Ceres is an advocate for sustainability leadership. Ceres mobilizes a powerful network of investors, companies and public interest groups to accelerate and expand the adoption of sustainable business practices and solutions to build a healthy global economy.

"Ceres in Brief" (2 August 2010), online: Ceres <<http://www.ceres.org>>. Note that in 2009 Suncor merged with Petro-Canada and united under the Suncor brand. The companies amalgamated pursuant to a plan of arrangement and exist today as Suncor Energy Inc as a *Canada Business Corporations Act* company.

<sup>9</sup> *Canada Business Corporations Act*, RSC 1985, c C-44, s 122(1) [*CBCA*].

<sup>10</sup> The case study explicitly focuses on the decisions of directors; however the same statutory fiduciary duties apply to the officers of a corporation under section 122(1) of the *CBCA*.

<sup>11</sup> Stepan Wood, "Voluntary Environmental Codes and Sustainability" in Benjamin Richardson & Stepan Wood, eds, *Environmental Law for Sustainability* (Oxford: Hart, 2006) 229 at 230.

developed technology.<sup>12</sup> This process received regulatory approval from the Alberta Energy Resources Conservation Board in June 2010.<sup>13</sup> Tailings Reduction Operations (TRO) is a tailings management technology that involves converting fluid tailings into a solid landscape suitable for reclamation. Tailings are a mixture of fine sands, clay, water and residual bitumen produced through the oil sands extraction process. When these tailings settle, a portion will eventually form mature fine tailings. These tailings have historically taken many decades to firm up sufficiently for reclamation.<sup>14</sup> TRO speeds up the drying process that is already occurring in conventional heavy water-based tailings.<sup>15</sup>

Tailings contain toxic contaminants such as heavy metals and acids that break down very slowly and therefore pose a long-term threat to the groundwater of the region. A report published by Environmental Defence concluded that oil sands tailing ponds leak more than 11 million litres of contaminated water per day.<sup>16</sup> Speeding up the reclamation process is therefore important for those concerned with long-term environmental contamination.<sup>17</sup>

<sup>12</sup> Suncor committed to reduce water intake, increase land area's reclaimed, improve energy efficiency and reduce greenhouse gas emissions. All of these promises were absolute with the exception of energy efficiency which is intensity based. "Suncor Sustainability Report: Sets Four Environmental Goals for 2015" (19 August 2010), online: Environmental Leader <<http://www.environmentalleader.com>>.

<sup>13</sup> Energy Resources Conservation Board, News Release, 2010-08, "ERCB Conditionally Approves Suncor Plan to Reduce Fluid Tailings (17 June 2010), online: Alberta Government <<http://alberta.ca>> [ERCB Press Release]. Suncor has been researching, developing and testing the TRO technology since 2003. The particular project is located 40 km northwest of Fort McMurray. Green Congress, "Suncor Energy Receives Conditional Regulatory Approval for Oil Sands Tailings Management Plan; Projected 30% Reduction in Volume" (18 June 2010), online: Green Congress <<http://www.greencongress.com>>.

<sup>14</sup> *Ibid.* For a more in-depth review of Suncor's reclamation techniques concerning liquid fine tailings see Melinda Mamer, "Oil sands tailings technology: understanding the impact to reclamation" (2010), online: British Columbia Mine Reclamation Symposium <<https://circle.ubc.ca>>.

<sup>15</sup> TRO is expected to increase reclamation of tailings ponds by "decades and [has] already enabled the cancellation of plans to build five additional tailings ponds at...[Suncor's] existing operations." Suncor Energy Inc, 2010 *Annual Report* (26 January 2011), online: Suncor Energy Inc <<http://www.suncor.com/pdf/Suncor-English-Annual-Report.pdf>> at 5 [*Annual Report*]. The Sustainability Report states: "We expect the TRO™ process to result in reclaimable surfaces 10 years after initial disturbance—the comparable timeframe using CT is about 30 years." 2010 *Report on Sustainability*, *supra* note 8 at 12. Elsewhere, Suncor restates that TRO will "reduce the time it takes from initial land disturbance to have reclaimable surface to about 10 years—a third of what is now the industry standard." Suncor Energy Inc, 2011 *Sustainability Report* (July 2011), online: Suncor <<http://sustainability.suncor.com>>. In March 2011, Suncor won a major reclamation award recognizing the "importance of long-term corporate commitment to reclamation through innovation and improved reclamation techniques" with TRO. Suncor Energy Inc, Press Release, "Suncor Energy Recognized for Reclamation Efforts" (4 March 2011), online: Suncor <<http://www.suncor.com>>. Furthermore, the Canadian Institute of Chartered Accountants recognized Suncor in 2010 for its report on sustainability.

<sup>16</sup> Environmental Defence, "11 Million Litres a Day: The Tar Sands' Leaking Legacy" (December 2008), online: Environmental Defence <<http://www.environmentaldefence.ca>> at 2.

<sup>17</sup> TRO "has significant benefits such as: accelerating reclamation, reducing the need for more tailings ponds and reducing the existing inventory of [mature fine tailings]." Mamer, *supra* note 14 at 1. During the Suncor TRO process:

[Mature fine tailings] is mixed with a polymer flocculent and then deposited in thin layers over sand beaches with shallow slopes. This drying process occurs over a matter of weeks, allowing more rapid reclamation activities to occur. The resulting product is a dry material that can be reclaimed in place or moved to another location for contouring and replanting with native vegetation, according to Suncor. The Alberta Energy Regulator believes that application of TRO will enable Suncor to reduce the volume of fluid tailings remaining at the end of the project life by approximately 30%. Further, Suncor's approved plan by the Alberta Energy Regulator does not call for the creation of any new tailings ponds and will allow Suncor to operate five fewer tailings ponds and use less space for fluid tailings storage than originally applied for.

TRO is advantageous from an environmental perspective for at least two reasons. Firstly, TRO eliminates the need for large-scale liquid tailings ponds like the kind that were at the centre of the 2010 conviction of Syncrude Canada Ltd. (Syncrude) for causing the death of approximately 1,600 ducks near the company's oil sands operations in northern Alberta.<sup>18</sup> Wildlife, and fowl in particular, are attracted to liquid-based tailings, mistaking them for natural lakes. Where TRO has been implemented, a tailings pond's surface is not a pure liquid, and the overall footprint and circumference of the pond is reduced. Secondly, Suncor reports that the time it takes for the surface of the tailings to be suitable for reclamation and revegetation is reduced from 30 years to 10 years, making the entire project less time consuming.<sup>19</sup>

The downside is that the technology is very expensive. Suncor spent \$670 million implementing TRO in 2011, which was about 10% of Suncor's total capital budget.<sup>20</sup> By 2012, the cost of implementing TRO was over \$1.3 billion.<sup>21</sup> Former Suncor CEO Rick George wrote: "We invested about \$250 million developing TRO and will have spent another \$1 billion by 2013 to install it throughout the operation. That's a lot of money by anyone's standard."<sup>22</sup>

In addition, TRO technology is still in the process of commercial deployment, and the benefits, while promising, are uncertain. There is reasonable concern that Suncor's expectations of TRO technology (or 'dry tailings') dramatically reducing reclamation time may prove untrue. This possibility was highlighted in a 2009 report on oil sands operators, which found "technology undertakings made during the permitting process do not always translate to the final project" and "promised commercial-scale dry tailings...seems to be backtracking."<sup>23</sup> On this basis, there is no guarantee that TRO will ultimately succeed in reducing the length of time required for reclamation.

In Suncor's 2010 Annual Report, the company announced that it was the first oil sands operator to "complete surface reclamation of a tailings pond."<sup>24</sup> It took Suncor approximately 40 years to reclaim this pond without the aid of TRO. Given that TRO is, as yet, an unproven technology, it is unclear on what basis Suncor estimates a 10-year window for surface reclamation.<sup>25</sup> As of 2013 the company is operating six TRO drying

Green Congress, *supra* note 13.

<sup>18</sup> *R v Syncrude Canada Ltd*, 2010 ABPC 229, 53 CELR (3d) 194. Syncrude was convicted under the *Migratory Birds Convention Act*, SC 1994, c 22 and the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

<sup>19</sup> *Annual Report*, *supra* note 15 at 5.

<sup>20</sup> See Suncor Energy Inc, *2010 Annual Information Form* (3 March 2011), online: Suncor <[http://www.suncor.com/pdf/3161587\\_Suncor\\_Annual\\_Information\\_Form.pdf](http://www.suncor.com/pdf/3161587_Suncor_Annual_Information_Form.pdf)> at 9.

<sup>21</sup> Suncor Energy Inc, *TRO Update as part of the 2013 Report on Sustainability* (2013), online: Suncor <<http://sustainability.suncor.com>>.

<sup>22</sup> Rick George, *Sun Rise: Suncor, The Oil Sands and the Future of Energy* (Toronto: HarperCollins Publisher Ltd, 2012) at 170.

<sup>23</sup> Michelle de Cordova & Jamie Bonham, *Lines in the Sands: Oil Sands Sector Benchmarking* (November 2009), online: Northwest & Ethical Investments LP <<http://www.strategywest.com/downloads/LinesintheSands2009.pdf>> at 34.

<sup>24</sup> *Annual Report*, *supra* note 15 at 3.

<sup>25</sup> Suncor's speculation on such matters does not necessarily create legal liability if the assumption becomes untrue. In order to create legal liability, the assumption would have to be made fraudulently, deceitfully or negligently in light of the facts. See *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165, 146 DLR (4th) 577 for a thorough overview of these principles. (Note that the *Hercules* case is premised on 3<sup>rd</sup> party auditor liability and not direct corporate liability.)

systems, compared to four in 2010, and expansion will continue to advance over the next three years. By 2012, the cost of implementing TRO was over \$1.3 billion.<sup>26</sup>

Finally, it is important to note that TRO is not driven entirely by an effort to comply with existing legal requirements. Evidence suggests that Suncor can comply with existing legal regulations without the expense that TRO development and implementation requires. TRO is designed to eliminate tailings effectively and expediently, and in a way that meets existing regulations on tailings reclamation. However, the regulator responsible for enforcing these reclamation rules and standards does not require compliance by oil sands operators. Thus, if Suncor directors insist on funding TRO, they may be vulnerable to disgruntled shareholders who object to corporate spending on an initiative that surpasses regulations.

### Directive 074

Effective June 17, 2013, the Alberta Energy Regulator (AER) succeeded the Energy Resources Conservation Board. The AER continues to regulate oil sands mining and tailings under the *Oil Sands Conservation Act*.<sup>27</sup> Established in 2009, Directive 074 requires oil sands operators to reduce the amount of fine tailings going into liquid tailings.<sup>28</sup> The Directive is concerned with trafficability of fine tailings deposits or, in other words, how much weight the tailings can bear after drying.<sup>29</sup> These dry deposits must be ready for reclamation within five years after deposits have ceased.<sup>30</sup>

Oil sands companies must provide a comprehensive plan to reduce the amount of fine tailings they store and deposit, in accordance with the above regulations. The plan must be approved by the AER. Companies must also provide annual and quarterly reports on the progress of their tailings reclamation programs.<sup>31</sup> In 2009, Imperial Oil Resources Ventures Limited, Canadian Natural Resources Limited, Shell, Syncrude, and Suncor submitted plans under Directive 074. By the end of 2010, the AER had ap-

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<sup>26</sup> Suncor Energy Inc, *TRO Update* as part of the *2013 Report on Sustainability* (2013), online: Suncor <<http://sustainability.suncor.com>>.

<sup>27</sup> *Oil Sands Conservation Act*, RSA 2000, c O-7.

<sup>28</sup> Alberta Energy Regulator, "Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes" (3 February 2009), online: Alberta Energy Regulator <<http://www.aer.ca/documents/directives/Directive074.pdf>>.

<sup>29</sup> Terra Simieritsch, Joe Obad & Simon Dyer, *Tailings Plan Review: An Assessment of Oil Sands Company Submissions for Compliance with Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes* (December 2009), online: Pembina Institute and Waters Matter <<http://www.water-matters.org/docs/tailings-plan-review.pdf>> at 6.

<sup>30</sup> Green Congress, *supra* note 13.

<sup>31</sup> As noted in an ERCB (as it was formerly known) press release concerning Suncor: "The submission of the tailings plan is an annual requirement of Directive 074, which will allow the [AER] to continuously monitor tailings operations and provide a means to take enforcement action when necessary. Compliance with the two main Directive 074 criteria (fines capture and DDA strength) is to be measured by companies annually starting in 2011. Additional reporting is required on the fluid tailings content of each pond annually and is scheduled to be submitted along with the annual tailings plan to the [AER] by September 30 of each year." ERCB Press Release, *supra* note 13 at 2.

proved each plan.<sup>32</sup> Of the five different companies, only Suncor's plan is in substantial compliance with Directive 074.<sup>33</sup>

Under Suncor's plan, the company will comply with the Directive until 2018, which is when Suncor plans to relocate tailings material as part of the TRO process and de-commission portions of the reclamation facility.<sup>34</sup> As a result of these operational changes, Suncor will not meet the Directive's requirements between 2018 and 2020.<sup>35</sup> Thus, even Suncor anticipates a lapse in the regulatory requirements concerning timely reclamation of its tailings.

Despite this gap, one environmental non-governmental organization (ENGO) has suggested that Suncor "raises the bar for all companies operating in the oil sands, and it is essential that other oil sands companies are required to meet the new rules to deal with toxic tailings waste."<sup>36</sup> By the same token, Gail Henderson, an assistant professor at the University of Alberta Faculty of Law, argues the development of TRO demonstrates that private industries "can extract and process natural resources so as to better preserve the surrounding environment" when they are given the right incentives.<sup>37</sup>

The reason for this adulation is likely because the AER has been even more flexible in approving the plans of Suncor's competitors.<sup>38</sup> One report found that: Canadian Natural Resources Limited will not be compliant with the Directive prior to 2025, Imperial Oil Resources Ventures Limited will not meet the Directive until 2023; and Shell will not comply under its plan before 2019 in regard to one tailings pond and 2027 for another.<sup>39</sup>

<sup>32</sup> Energy Resources Conservation Board, News Release, 2010-20, "AER Conditional Approval of Final Two Tailings Plans Ends Initial Phase of Directive 074" (17 December 2010), online: AER <<http://www.aer.ca/documents/news-releases/NR2010-20.pdf>> ["AER Conditional Approval"].

<sup>33</sup> Simieritsch, Obad & Dyer, *supra* note 29 at 30-31. Note that Fort Hill's plan is also substantially compliant (Suncor acquired the Fort Hills project from the merger with Petro Canada in 2009) *Ibid* at 21.

<sup>34</sup> Suncor Energy Inc., "DDA Plan Prepared in Accordance with Directive 074 – Appendix C" (January 2009), online: AER <[http://www.aer.ca/documents/oilsands/tailings-plans/Suncor\\_20100129\\_DDAPlanSubmission.pdf](http://www.aer.ca/documents/oilsands/tailings-plans/Suncor_20100129_DDAPlanSubmission.pdf)> at 16.

<sup>35</sup> "AER Conditional Approval", *supra* note 32.

<sup>36</sup> Simon Dyer, "Pembina reacts to Suncor's proposed new tailings technology" *The Pembina Institute* (23 October 2009), online: The Pembina Institute <<http://www.pembina.org>>.

<sup>37</sup> Gail E Henderson, "Rawls & Sustainable Development" (2011) 7 JSDLP 3 at 19-20.

<sup>38</sup> Andrew Leach, "Oilsands Debate in Edmonton Centre" (19 April 2011), online: Rescuing the frog <<http://www.andrewleach.ca>>. For an explanation of Suncor's competitors tailings technology see Garth Parker, Arnie Olyan & Melanie Condic, "Oil Sands Extraction Technologies: Perception and Production" (2011), online: Gowlings <<http://www.gowlings.com>>.

<sup>39</sup> Simieritsch, Obad & Dyer, *supra* note 29 at 30-31. Syncrude's initial plan expressly stated it would not demonstrate compliance with Directive 074, however this was revised and it is expected to reach compliance with Directive 074 in 2014. As stated by the AER (formerly the ERCB):

The Syncrude plans as originally filed on September 30, 2009, did not fully meet...[AER] requirements. Subsequent consultations between Syncrude and the...[AER] have seen significant improvements to the company's plans. The...[AER] has imposed conditions (see background) on Syncrude's approval that will enable the company to meet and exceed Directive 074 requirements by 2014.

Energy Resources Conservation Board, News Release, 2010 "ERCB Approves Fort Hills and Syncrude Tailings Pond Plans with Conditions" (23 April 2010), online: AER <<http://www.aer.ca/documents/news-releases/NR2010-05.pdf>>.

At the time the AER (formerly the ERCB) granted the conditional approval to Syncrude one commentator stated succinctly that "the regulator approved a plan by a company that clearly stated it would not meet the regulations." Dan Woynillowicz, "When it comes to enforcing its regulations, is the ERCB more bark than bite?" *The Pembina Institute* (25 August 2010), online: The Pembina Institute <<http://www.pembina.org>>.



In effect, the AER exempts these companies from the Directive for many years to come. This suggests that Suncor's TRO plan goes further than the company is required to go under current law. Suncor is complying with Directive 074 and developing TRO as an effective strategy to meet existing regulations; however, in practice, the AER has not required oil sands operators to strictly comply with Directive 074. Thus, given that TRO is expensive to implement and that it may not be necessary to meet current legal obligations, Suncor's strategy would appear unreasonable from a cost savings perspective. This is particularly true if one accepts that the primary rationales for going forward with TRO are the benefits to the environment and corporate reputation.

In light of the AER's failure to enforce Directive 074, it is unclear what incentives Suncor has to continue with its robust TRO program, absent those mandated by law. In 2012, Suncor announced a review of company spending to "wrangle back costs and boost profits."<sup>40</sup> Hypothetically, if the cost of TRO implementation continues to escalate and if Suncor's directors deem the costs of TRO superfluous, then it is possible the program could be suspended or cut back. Conversely, Suncor's directors could choose to proceed with TRO's implementation notwithstanding the impact this would have on the company's immediate profitability.

This case study posits a hypothetical situation involving the future of TRO: what if Suncor's TRO process proves to be effective from an environmental standpoint, yet becomes more costly from a financial perspective than Suncor either anticipates or is willing to pay when one takes the company's profitability into account?<sup>41</sup>

In this scenario, Suncor's directors must choose between two options in accordance with their statutory fiduciary duties. Firstly, the directors can increase or maintain expenditures on TRO in order to meet the 10-year commitment as pledged in the Sustainability Report. Alternatively, the company can limit projected expenditure on TRO for financial reasons and, in doing so, fail to meet the 10-year target for reclaiming a tailings surface suitable for revegetation.

This hypothetical scenario assumes that Suncor will experience decreased liquidity to support operations such as TRO implementation and development. The reasons for this decrease in revenue may be attributed to increased costs, dropping oil prices, or both. Suncor previously acknowledged the risks associated with escalating costs for TRO implementation.<sup>42</sup> Moreover, in 2013 there were reports that Suncor investors had grown impatient with the company's stock valuation after falling by 40% in two years.<sup>43</sup>

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<sup>40</sup> Nathan VanderKlippe, "Suncor pulls back on growth ambitions" *The Globe and Mail* (25 July 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>41</sup> The future of TRO is merely considered in this example for the purposes of testing legal liability for representations made in a corporate sustainability report and not based on the scientific merit behind TRO technology and prospects. The goal is not to impugn Suncor with negative assumptions, however the possibility exists that TRO technology may not effectively streamline the reclamation process as quickly or in a cost effective fashion as the Sustainability Report suggests.

<sup>42</sup> See the 2011 Suncor Annual Information Form:

There are risks associated specifically with our ability to reclaim tailings ponds containing mature fine tailings with TRO™ or other methods and technologies. Suncor expects that TRO™ will help the company reclaim existing tailings ponds by reducing tailings. The success of TRO™ or any other methods or technology and the time to reclaim tailings ponds could increase or decrease our decommissioning and restoration cost estimates. Our failure or inability to adequately implement our reclamation plans, including our planned implementation of TRO™, could have a material adverse effect on Suncor's business, financial condition, results of operations and cash flow.

Lastly, this scenario assumes that the AER would grant an extension on the timeframe to complete the TRO process, ensuring Suncor's costs do not escalate as it endeavours to meet the projected end date of 2020–2021. However, while Suncor would still be compliant with Alberta regulations, this result would violate certain promises contained in the Sustainability Report, namely that TRO would accelerate overall mine reclamation efforts by drying “tailings into a material solid enough to be reclaimed in a fraction of the time that earlier technologies require.”<sup>44</sup>

The question now is not whether Suncor would be in breach of environmental regulations, but whether Suncor's directors would be in breach of their statutory fiduciary duties in light of the company's statements in the Sustainability Report. With falling corporate profits, high costs, uncertain outcomes, and few regulatory requirements for its implementation, should Suncor continue with the TRO program, despite monetary constraints?

Suncor has different groups of stakeholders with different interests in the corporation. On one hand, there are socially-minded shareholders like ethical investment funds and ENGOs.<sup>45</sup> Such groups may launch an action under the *CBCA* to enforce a voluntary sustainability policy.<sup>46</sup> On the other hand, the remaining stakeholders include profit-driven shareholders that prefer the maximization of shareholder wealth.<sup>47</sup> Both these types of investors exist outside the scope of this hypothetical case study.

This case study confronts the following two issues:

- 1) What are the legal implications if Suncor's directors decide to apply further funding to fulfil the Sustainability Report pledges at the expense of shareholder profit?
- 2) Under Canadian corporate law, can profit-driven shareholders hold the directors to account for promoting an environmental interest that is not otherwise required by existing regulations?

Suncor Energy Inc, *2011 Annual Information Form* (1 March 2012), online: Suncor Energy Inc <[http://www.suncor.com/pdf/Suncor\\_AIF\\_2012\\_en.pdf](http://www.suncor.com/pdf/Suncor_AIF_2012_en.pdf)> at 59. Further: “Suncor may provide cost estimates for major projects at the conceptual stage, prior to commencement or completion of the final scope design and detailed engineering necessary to reduce the margin of error of such cost estimates. Accordingly, actual costs can vary from estimates, and these differences can be material.” *Ibid* at 62.

<sup>43</sup> Tim Shufelt, “Buffett bets on Suncor and oil sands” *The Globe and Mail* (15 August 2013), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

<sup>44</sup> *2010 Report on Sustainability*, *supra* note 8.

<sup>45</sup> NEI Investments is one example. See NEI Investments, *About Ethical Funds* (2 August 2010), online: NEI Investments <<http://www.neiinvestments.com>>. Suncor has been held in two of NEI's funds: the Ethical Growth Fund and the Ethical Balanced Fund.

<sup>46</sup> The most likely scenario is that the stakeholder would use the oppression remedy. The oppression remedy is the mechanism by which stakeholders pursue a claim against a corporation or its directors for breaching ‘reasonable expectations’ under section 241 of the *CBCA*. The court has wide latitude of discretion in determining what is reasonable. Once the claimant has established its reasonable expectation, the claimant must demonstrate that the corporation's failure to meet that expectation caused oppression, unfairness or prejudice of the claimant's interest. Oppression claims in Canada can be asserted against a corporation or any of its affiliates including directors, officers, or employees of the company. However, the claimant would still have to show the conduct at issue was corporate conduct, as opposed to personal. See Stephanie Ben-Ishai & Puri Poonam, “The Canadian Oppression Remedy Judicially Considered: 1995–2001” (2004) 30 *Queen's LJ* 79.

<sup>47</sup> For instance, in August 2013 one of the world's “foremost” investors, Warren Buffett, financed a \$620-million investment in Suncor. Shufelt, *supra* note 43.

To answer these questions, one must turn to the law of corporate accountability. Corporate accountability focuses on the considerations that directors must take into account when making decisions based on the best interests of the corporation.<sup>48</sup> The considerations that directors may or must consider are directly connected to statutory fiduciary duties as contained in the *CBCA*.

## 2. STATUTORY FIDUCIARY DUTIES OF CORPORATE DIRECTORS

Before the enactment of the *CBCA* the best interests of a corporation were considered analogous to the best interests of current and future shareholders.<sup>49</sup> American law has also primarily interpreted “the best interests of the corporation” as synonymous with maximizing shareholders’ wealth.<sup>50</sup> In the famous 1919 case of *Dodge v Ford Motor Co*, the Michigan Supreme Court held that “[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”<sup>51</sup> Similarly, in *Revlon v MacAndrews & Forbes Holdings*, a 1986 decision of the Delaware Supreme Court, the court said that directors have a duty to maximize shareholder value once the sale of a company is inevitable.<sup>52</sup> However, the idea that directors’ fiduciary duties are directed to the best interests of the corporation, rather than individual stakeholders, predates the *CBCA* by almost a century.<sup>53</sup>

The notion that corporate directors may only consider the interests of current and future shareholders is commonly known as the **shareholder primacy model** of corporate accountability.<sup>54</sup> Some commentators have declared that shareholder primacy is the

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<sup>48</sup> Corporate accountability embodies the obligations of corporate directors towards stakeholders. Conversely, some have described corporate accountability by defining the substantive legal rights stakeholders have in relation to a board of directors. *The Canadian Democracy and Corporate Accountability Commission, The New Balance Sheet: Corporate Profits and Responsibility in the 21<sup>st</sup> Century* (2002) at 2-5, as reported in Michael Kerr et al, *Corporate Social Responsibility: A Legal Analysis* (Markham, ON: LexisNexis Canada Inc, 2009) at 28 [Kerr].

<sup>49</sup> See *Martin v Gibson*, [1907] 15 OLR 623 at 623, [1907] OJ No 85 (Ont HCJ). The holding in *Martin* was reflected in *Parke v Daily News Ltd*, [1962] 1 Ch 927 Ch D (Eng), an English case but nevertheless cited with approval in subsequent Canadian decisions.

<sup>50</sup> *Mills Acquisition Co v Macmillan Inc*, 559 A 2d 1261 at 1282, n 29 (Del 1989).

<sup>51</sup> *Dodge v Ford Motor Co*, (1919) 204 Mich 459 at 684, 170 NW 668 (Mich 1919).

<sup>52</sup> *Revlon Inc v MacAndrews & Forbes Holdings, Inc*, 506 A 2d 173 at 182 (Del 1986).

<sup>53</sup> As stated in 1883 by the British Lord Bowen in *Hutton v West Cork Railway*, “[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.” (1883), 23 Ch D 654 at 673 Ch D (Eng).

<sup>54</sup> Early developments of the shareholder primacy model begin with Ronald Coase. Ronald Coase, “The Nature of the Firm” (1937) 4 *Economica* 386. Michael Jensen and William Meckling advocated the agency theory of shareholder primacy whereby the shareholders should receive the benefits of the corporation as the principals in an agency relationship. Michael Jensen & William Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” (1976) 3 *Journal of Financial Economics* 305. The shareholder primacy model was supported by Milton Friedman who said: “[The] Responsibilities [of directors] is to conduct the business in accordance with the desires [of shareholders], which generally will be to make as much money as possible.” Milton Friedman, “The Social Responsibility of the Corporation is to Increase its Profits” (1970) *New York Times Magazine* (13 September 1970), online: University of Michigan <<http://www.umich.edu/~thecore/doc/Friedman.pdf>> at 1.

“end of corporate law” as a final answer in explaining the function of a corporation.<sup>55</sup> However, other commentators have recently argued shareholder primacy “is, at best, premature, and, at worst, incorrect.”<sup>56</sup> An alternative view to shareholder primacy supports a **stakeholder model** of corporate accountability, which asserts that directors should consider various interests beyond those of the shareholders.<sup>57</sup>

In Canada, the law of directors’ and officers’ fiduciary duties is set out in section 122(1) of the *CBCA*.<sup>58</sup> It states:

122(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.<sup>59</sup>

The *CBCA* is the federal legislative approach to corporate law in Canada, and the provinces have all adopted essentially similar legislation.<sup>60</sup> The *CBCA* does not define in precise terms what “the best interests of the corporation” means. Therefore, this task has been left to judicial interpretation.

The following section reviews the most recent and prominent decisions involving an interpretation of section 122(1) of the *CBCA* by the Supreme Court of Canada, including *Peoples* and *BCE*.<sup>61</sup> These judgments are then applied to the case study concerning the legal impacts of corporate environmental pledges in Part 3.

<sup>55</sup> Henry Hansmann & Reinier Kraakman, “The End of History for Corporate Law” (2001) 89 Geo LJ 439 at 441.

<sup>56</sup> Leonard Rotman, “Debunking the ‘End of History’ Thesis for Corporate Law” (2010) 33 BC Int’l & Comp L Rev 219 at 268. This debate has been canvassed elsewhere in academic literature. See Merrick E Dodd, “For Whom are Corporate Managers Trustees?” (1932) 45 Harv L Rev 1145; Adolf Augustus Berle Jr & Gardiner Means, *The Modern Corporation and Private Property*, (New York: Macmillan, 1993).

<sup>57</sup> For academic sources supporting a stakeholder model of corporate accountability see Margaret Blair & Lynn Stout, “A Team Production Theory of Corporate Law” (1999) 85 Va L Rev 248 on the Team Production Model. Also see Cynthia Williams, “Corporate Compliance with the Law in the Era of Efficiency” (1998) 76 NCL Rev 1265 at 1382-83 on enlightened shareholder value. For further information on the stakeholder model and various theories of corporate accountability, see Jeffrey Bone, “Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?” (2011) 24(2) Can JL & Jur 277.

<sup>58</sup> This was the work of the reforms introduced by the Dickerson Committee, an advisory body charged with the task of reforming and modernizing Canadian corporate law. See Mohamed Khimji, “Peoples v Wise – Conflating Directors Duties, Oppression, and Stakeholder Protection” (2006) 39 UBC L Rev 209 at 212. The committee presented its findings in the *Dickerson Report*. Robert Dickerson, John Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada (The Dickerson Report)*, vol 1 Commentary; vol 2 Draft Canada Business Corporations Act (Ottawa: Information Canada, 1971).

<sup>59</sup> *CBCA*, *supra* note 9.

<sup>60</sup> Professor Welling wrote: “The *CBCA* variation on the Ontario initiative swept the country. Manitoba, Saskatchewan, Alberta, New Brunswick, Ontario Yukon, and Newfoundland adopted statutes remarkably similar to the *CBCA*.” Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3d ed (Queensland: Scribblers, 2006) at 56. Further, New Zealand and several Caribbean countries have also enacted corporate statutes as variations of the *CBCA*. *Ibid* at 57.

<sup>61</sup> It is generally accepted that *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 28, [2004] 3 SCR 461 [*Peoples*] and *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 [*BCE*] are the leading cases on section 122(1) of the *CBCA*. For *Peoples* see Catherine Francis, “Peoples Department Stores Inc v Wise: The Expanded Scope of Directors’ and Officers’ Fiduciary Duties and Duties of Care” (2005) 41 Can Bus LJ 175;

## Peoples and BCE

*Peoples* arose from the acquisition of Peoples Department Store by a competitor and the implementation of a joint procurement policy between the two entities.<sup>62</sup> Interpreting section 122(1) of the *CBCA*, the Supreme Court of Canada said that it “may be legitimate,” but not mandatory, for directors to consider the impact of a corporate decision on a particular group of stakeholders.<sup>63</sup> The Court framed the statutory fiduciary duty to consider “the best interests of the corporation” in permissive terms:

We accept as an accurate statement of law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.<sup>64</sup>

The Court rejected the argument that directors owe statutory fiduciary duties to any particular corporate constituent, saying “it is clear that the phrase the ‘best interests of the corporation’ should be read not simply as the ‘best interests of the shareholders.’”<sup>65</sup> Instead, directors should seek to create “a ‘better’ corporation, and not to favour the interest of any one group of stakeholders.”<sup>66</sup>

It was in *Peoples* that the Supreme Court first formally approved the business judgment rule.<sup>67</sup> This rule developed as a common law doctrine that permits courts to defer

Darcy MacPherson, “The Supreme Court Restates Directors’ Fiduciary Duty – A Comment on *Peoples Department Stores v Wise*” (2006) 43 *Alta L Rev* 383; Stéphane Rousseau, “Director’s Duty of Care after *Peoples*: Would it Be Wise to Start Worrying about Liability?” 41 (2005) *Can Bus LJ* 223; Wayne Gray, “A Solicitor’s Perspective on *Peoples v Wise*” (2005) 41 *Can Bus LJ* 184; and for *BCE* see “Symposium on the Supreme Court’s *BCE* Judgment” 48 *Can Bus LJ* No 2 which includes: Mohammad Fadel, “*BCE* and the Long Shadow of American Corporate Law” (2009) 48 *Can Bus LJ* 190; Jeremy Fraiberg, “Fiduciary Outs and Maximizing Shareholder Value Following *BCE*” (2009) 48 *Can Bus LJ* 213; Jeffrey MacIntosh, “*BCE* and The Peoples’ Corporate Law: Learning to Live on Quicksand” (2009) 48 *Can Bus LJ* 255; Edward Iacobucci, “Indeterminacy and The Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” (2009) 48 *Can Bus LJ* 232; and James Tory, “A Comment on *BCE Inc*” (2009) 48 *Can Bus LJ* 287.

<sup>62</sup> The decision dates back to 1992 when the Wise brothers (Wise) purchased Peoples Department Store Inc. (Peoples) by way of a share purchase agreement. The brothers become shareholders and directors for both companies. According to the terms of this agreement, Peoples could not amalgamate with Wise until payment of the purchase price in full. The amortization period on the purchase price was originally eight years, and during that time Wise had to abide by strict covenants concerning the financial management of the corporation. On account of these covenants and given the fact the corporations were operating in financial turmoil, Wise implemented a joint inventory procurement policy, which had the effect of ultimately indebting Peoples to Wise. Subsequently both entities went into receivership. The allegation of the Trustee in bankruptcy was that Wise had favoured their own interests to the detriment of the creditors’ interests in Peoples. The Supreme Court held that the directors of Peoples, mainly the Wise brothers did not contravene section 122(1) of the *CBCA* in arranging the joint inventory procurement policy. *Peoples*, *supra* note 61.

<sup>63</sup> *Ibid* at para 42.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid* at para 47. In previous case law on this point, the court also said directors should attempt to make the company a “better corporation.” See *820099 Ontario Inc v Harold E Ballard Ltd* (1991), 3 BLR (2d) 123 (Ont Ct (Gen Div)), *aff’d* (1991), 3 BLR (2d) 113 (Ont Div Ct) at para 171.

<sup>67</sup> See in *Peoples*, *supra* note 61 at para 65, where regarding the business judgment rule the court quotes with favour *Maple Leaf*:

to the directors' business judgment as long as an appropriate amount of prudence, diligence, and reasonableness was used in making their decision.<sup>68</sup>

Four years after *Peoples*, the Supreme Court of Canada augmented this standard in *BCE Inc v 1976 Debentureholders* by linking directors' fiduciary duties with "fairness" and good corporate citizenship.<sup>69</sup> The *BCE* decision concerned the privatization of BCE Inc. and Bell Canada (BCE), which would have transferred corporate ownership to a syndicate of private equity investors led by the Ontario Teachers' Pension Plan Board.<sup>70</sup> This would have significantly devalued existing bonds of the corporation.<sup>71</sup>

The salient legal issues in *BCE* were the fiduciary duties of directors, the application of the business judgment rule, and the doctrine of corporate citizenship. The Court held that directors have a fiduciary obligation toward the corporation itself. If there is a conflict between the corporation, shareholders, and other stakeholders, "the directors' duty is clear—it is to the corporation."<sup>72</sup> The Court restated its ruling in *Peoples* that the interests of the corporation include a consideration of several corporate constituents

The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision.

See *Pente Investment Management Ltd v Schneider Corp* (sub nom *Maple Leaf Foods Inc v Schneider Corp*) (1998), CanLII 5121 (ON CA), 42 O.R. (3d) 177 (Ont CA) at paras 35-36. While *Maple Leaf* considers section 134(1)(a) of the Ontario *Business Corporations Act*, RSO 1990, c B16. (*OBCA*), the language in the *OBCA* is virtually verbatim to the *CBCA*, and *Maple Leaf* has been cited enumerable times in relation to the interpretation of section 122(1) of the *CBCA*. Canadian cases had previously adopted a 'proper purpose test' under the business judgment rule that shifts the burden to directors to demonstrate their actions are consistent with the best interest of the company.

<sup>68</sup> See *Exco Corporation v Nova Scotia Savings & Loan Company* (1987), 35 BLR 149, 78 NSR (2d) 81, (NSSC (TD)) and *Re 347883 Alberta Ltd and Producers Pipelines Inc* (1991), 80 DLR (4th) 359, 92 Sask R 81, (Sask CA).

<sup>69</sup> *BCE*, *supra* note 61 at paras 71 & 81. While the context of the *BCE* decision concerns fundamental change of control scenarios, the decision has a general application on directors' fiduciary duties towards stakeholders. See Peer Zumbansen & Simon Archer, "The BCE Decision: Reflections on the Firm as a Contractual Organization" (2008) CLPE Research Chapter 17/2008 vol 04 No 04.

<sup>70</sup> The privatization under the proposed consortium of owners would have seen the syndicate invest \$8 billion of capital and required an additional \$30 billion of new BCE debt. Jim Middlemiss, "BCE ruling good news for boards", *Financial Post* (20 December 2008) FP6.

<sup>71</sup> In 2008, BCE commenced litigation against the consortium for breach of contract in the amount of \$1.2 billion. In May 2008, the Québec Court of Appeal (QCA) ruled in favour of the holders of Bell Canada debentures (Bondholders) in permitting the use of the *CBCA* oppression remedy to challenge the BCE plan of arrangement. The shareholders initially approved this plan in September 2007. The Bondholders' arguments were threefold: (1) the privatization of BCE converted investment grade debt into junk bonds; (2) the plan of arrangement was not fair and reasonable; and (3) the BCE directors had not appropriately considered the Bondholders' interests. In their written decision, the QCA focused on the representations and understandings between BCE and the Bondholders which fell outside the scope of the trust indenture. The QCA held that BCE had continually assured the Bondholders that the investment grade rating of the bonds would continue. By entering the proposed transaction BCE had failed in this commitment. This case was destined for the Supreme Court of Canada, and in the spring of 2008 the Supreme Court granted leave to hear the appeal and subsequently overturned the QCA decision. Given that the subject matter of *BCE* was a time sensitive issue concerning a very large and pending commercial transaction, the case stratospherically went from a Superior Court trial decision to submissions before the Supreme Court of Canada in just over three months. Note that the deal was eventually terminated in December 2008 because the Ontario Teachers' Pension Plan Board was unable to obtain a professional accounting opinion on the solvency of the proposed transaction. *BCE*, *supra* note 61.

<sup>72</sup> *Ibid* at para 37.

such as shareholders, creditors, suppliers, governments, consumers, employees, and the environment.<sup>73</sup> Furthermore, the court interprets “the best interests of the corporation” as being “the long-term interests of the corporation.”<sup>74</sup>

Conspicuously, the court held that directors are entitled to significant deference from the judiciary by applying the business judgment rule:

Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The “business judgment rule” accords deference to a business decision, so long as it lies within a range of reasonable alternatives.<sup>75</sup>

When directors must balance conflicting corporate interests, the Court held that “it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”<sup>76</sup> Good corporate citizenship suggests there is a need for directors to “treat individual stakeholders affected by corporate actions equitably and fairly.”<sup>77</sup>

In *BCE*, the Court does not articulate a precise legal test or framework for corporate citizenship. It only suggests that the obligation is linked with treating individual stakeholders equitably and fairly when the directors consider conflicting interests.<sup>78</sup> *BCE* introduced the unprecedented notion of the “good corporate citizen” to Canadian corporate law.<sup>79</sup> This development builds on the analysis in *Peoples*, highlighting the willingness of the Supreme Court to defer to directors’ judgment. As a result, directors have discretion in choosing how to best integrate corporate social responsibility into corporate decision-making. In other words, they are free to make long-term sustainability decisions without fearing prospective litigation by shareholders who seek to

<sup>73</sup> *Ibid* at para 39.

<sup>74</sup> *Ibid* at para 38.

<sup>75</sup> *Ibid* at para 40. The court went on to say at para 84:

There is no principle that one set of interests—for example the interests of shareholders—should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

<sup>76</sup> *Ibid* at para 81. Note that in regard to the oppression remedy, the Supreme Court defined this obligation as a “responsible corporate citizen” as opposed to a “good corporate citizen.” *Ibid* at para 82.

<sup>77</sup> *Ibid* at para 82. When the court addressed the meaning of the good corporate citizen in paragraph 66 it said: Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen.

*Ibid* at para 66. The statement above from the Supreme Court suggests that the need to consider the interests of non-shareholders is corollary to good corporate citizenship. The court defined ‘fair treatment’ as “fundamental to the reasonable expectation of stakeholders.” *Ibid* at para 36. The court explains the expectation of fair treatment in this manner: “The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly.” *Ibid* at para 64.

<sup>78</sup> One commentator has suggested that corporate citizenship is the court attempting to reach a larger audience with an *obiter dicta* statement that acknowledges the growing trend of corporate social responsibility. Sarah P Bradley, “*BCE Inc v 1976 Debentureholders*: The new fiduciary duties of fair treatment, statutory compliance, and good corporate citizenship” (2010) 41 Ottawa L Rev 325 at 347.

<sup>79</sup> See Jeffrey Bone, “The Supreme Court Revisiting Corporate Accountability: *BCE Inc* in search of a legal construct known as the ‘Good Corporate Citizen’” (2010) Alta L Rev, online: Alberta Law Review Supplement <<http://www.albertalawreview.com>>.

maximize short-term returns.<sup>80</sup> However, good corporate citizenship is always tempered by the practical application of the business judgment rule, which allows directors to ultimately decide what is in the best interests of the corporation.

*Peoples* and *BCE* have had two main effects. Firstly, the business judgment rule creates a strong presumption in favour of the board of directors and corporate officers. As long as decisions are reached in good faith and with the care that a prudent person in similar circumstances would exercise, courts will defer to the directors. The directors need only behave in a manner that they reasonably believe is in the best interests of the corporation on an informed basis.

Secondly, the decisions in *Peoples* and *BCE* expand the list of stakeholders that directors may legitimately consider in ascertaining the best interests of the corporation. These leading cases seem to accept a more expansive role for corporate directors in the pursuit of socially responsible corporate objectives.<sup>81</sup> Thus, the Supreme Court's objective in writing *BCE* and *Peoples* can be interpreted as encouraging corporate directors to make decisions based on social values, rather than purely economic interests.

### Working Hypothesis for the Case Study

Given these findings, the working hypothesis for the case study is that a corporate board of directors may determine for itself whether to adopt environmental principles such as those contained in a voluntary corporate sustainability pledge. These promises might, for example, focus on ameliorating the impacts of the corporation on the environment. Directors may also embrace these same environmental objectives in a sustainability pledge if, in their view, they reasonably believe it will improve the long-term financial position of their shareholders. In this sense, directors may advance the same environmental goals for long-term profit-driven motives, effective corporate citizenship, or both.<sup>82</sup> Still, directors will not be held accountable for failing to achieve environmental pledges, as corporate directors are not legally mandated to consider environmental principles under section 122(1) of the *CBCA*.

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<sup>80</sup> Note that the preceding eight paragraphs are in part reprinted from Jeffrey Bone, "The Consideration of Sustainability by Corporate Directors" (2013) 26 J Envtl L & Prac 1.

<sup>81</sup> To put *BCE* in context, this shift has occurred in other jurisdictions. For instance, the fiduciary duties of directors in the U.K. requires them to "promote the success of the company for the benefit of its members as a whole" by taking into account the long-term considerations of employees, suppliers, customers, the community and the environment, among others. *Companies Act* (UK), 2006, c 46, s 172(1).

<sup>82</sup> These interests are not necessarily incongruent:

Recent years have seen a growth in the voluntary adoption of sustainability reporting in response to both stakeholders concerned with social and environmental performance and investors that rely on this type of non-financial data as an indicator of underlying corporate risks and likely future financial performance.

Ans Kolk & Paolo Perego, "Determinants of the Adoption of Sustainability Assurance Statements: An International Investigation" (2010) 19 Business Strategy and the Environment 182, online: Social Science Research Network <<http://www.ssrn.com>> at 3.



### 3. APPLICATION OF STATUTORY FIDUCIARY DUTIES TO THE CASE STUDY

This case study applies the analysis of section 122(1) of the *CBCA* from above to the 2010 Report on Sustainability of Suncor and issues surrounding the reclamation of tailings ponds in the Alberta oil sands. The working hypothesis is that directors are not required to fulfil sustainability pledges, but they have the discretion to implement the promises contained in a pledge, considering the leading case law on section 122(1) of the *CBCA*.

Using the scenario explained in Part 1, this case study asks the following questions: what is the legal effect if Suncor's directors break their Sustainability Report pledges concerning the anticipated reclamation timeline? Does renegeing on the stated expectations contained in the Sustainability Report create legal liability for Suncor's directors under section 122(1) the *CBCA*?

Alternatively, assume the directors decide to meet the deadline by increasing funding of the TRO program at the expense of shareholder wealth. This decision would result in greater spending on TRO, which in turn cuts into shareholder profit margins.<sup>83</sup> The reason the directors decide to perform above compliance with Directive 074 is to meet the standards contained in the Sustainability Report.<sup>84</sup> In this type of situation, are the directors in breach of section 122(1) of the *CBCA* because extra funding for TRO violates the expectations of profit-driven shareholders?

#### **Option 1: The directors break the pledges from the Sustainability Report concerning the anticipated reclamation timeline**

Under either option, the directors would have to make a decision between the reasonable expectations of two groups of shareholders with divergent interests. On the one hand, a socially-minded shareholder has ethical interests in the corporation, such as reducing the company's environmental and social impacts. On the other hand, a profit-driven shareholder is interested in maximizing profits to the exclusion of other interests. From this perspective, a decision that results in Suncor's failure to live up to the expectations of the Sustainability Report is a decision in favour of profit maximization.

In order to enforce the pledges in the Sustainability Report, a socially-minded claimant would have to successfully argue that the directors of Suncor breached their fiduciary duties to manage the environmental interests of corporate stakeholders along with the financial implications of the TRO program. That position would be difficult since directors can arguably permit the TRO process to continue past the express time-

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<sup>83</sup> For the purposes of this case study, the article uses the definition of 'shareholder wealth' as put forward by Milton Friedman. Friedman, *supra* note 54.

<sup>84</sup> It is important to note that Suncor has a select committee of directors that considers sustainability and environmental issues. The Environment, Health, Safety and Sustainable Development Committee (EHS&SD) reviews the company's effectiveness in meeting Suncor's obligations under the Sustainability Report. As per its mandate, the committee is responsible for reviewing Suncor's "Sustainability Report or other significant reports...[and to] [r]eview with legal counsel any legal matters having a significant impact on the EHS&SD reports." Suncor Energy Inc, *Mandate of Suncor's Environment, Health, Safety and Sustainable Development Committee* (1 February 2011), online: Suncor <[http://www.suncor.com/pdf/ehs\\_mandate\\_Feb2011.pdf](http://www.suncor.com/pdf/ehs_mandate_Feb2011.pdf)>. Further, The Chief Operating Officer holds "top executive responsibility for sustainable issues." *Annual Report*, *supra* note 15 at 68.

line of the Sustainability Report when one considers the aggregate interests of the corporation as a whole.

This is a matter of discretion for directors and reflects the deference accorded to the business judgment rule. As such, it becomes a question of whether the directors' decision to permit the company to break the pledges contained within the Sustainability Policy is "within a range of reasonable alternatives" that the directors considered.<sup>85</sup> As long as the decision was reached in good faith, with care and in a manner that the Suncor directors reasonably believe is in the best interest of the corporation as a whole, then the directors of Suncor would not be in breach of their fiduciary duties for renegeing on the timelines of the TRO program.<sup>86</sup>

On account of the business judgment rule, corporate directors are allowed to maintain the clandestine nature of boardroom decisions. The decision-making process can remain opaque without the benefit of objective and transparent accountability. Instead, directors can simply appeal to a broad standard of reasonableness in defending executive decisions.

For a socially-minded shareholder, to succeed in a claim of this nature requires unequivocal reasoning that continuing with TRO is the only prudent option given the directors' duty to manage stakeholder interests as a good corporate citizen. This likely requires more egregious action by Suncor's directors beyond failing to fulfil the expectations concerning TRO in the Sustainability Report. It requires a socially-minded shareholder to prove that Suncor's directors were somehow misguided in breaching the Sustainability Report, or that they did so in bad faith. Such a conclusion seems unlikely, if not impossible, given the directors' deeply rooted obligation to consider shareholder profit as part of the company's best interests and their broad discretion to judge the best interests of the business.

### **Option 2: The directors approve an increase in funding for the TRO program in order to meet the timelines contained in the Sustainability Report**

Under this option the directors of Suncor decide to increase expenditures on the TRO program at the expense of maximizing corporate profit (which equates to shareholder wealth). The reason the directors decide to reach beyond baseline compliance with Directive 074 is to meet the standards contained within the voluntary Sustainability Report. In such a situation, would the directors be in breach of section 122(1) of the *CBCA*? Would this breach result in legal liability if profit-driven shareholders object to the directors' decision?

It appears from the decisions in *Peoples* and *BCE* that Canadian law allows directors to consider community and public interests in determining the best interest of the corporation. Presumably, fulfilling the mandate of the Sustainability Report preserves the

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<sup>85</sup> *BCE*, *supra* note 61 at para 40.

<sup>86</sup> The application of the business judgment rule depends on whether the directors reached a sound conclusion in permitting an extension to the TRO program due to financial constraints. This depends on the treatment the directors gave to each independent corporate stakeholder and how the directors ultimately balanced those interests. It is more a concern about process and diligence beyond the actual conclusion and decision that the directors reach.

concept of social license, which is one aspect of corporate citizenship.<sup>87</sup> Further, the continuation of the pledges made in the Sustainability Report likely builds trust between Suncor, its regulators, impacted communities, and stakeholders that benefit from TRO.

In *Peoples*, and subsequently in *BCE*, the Court was clear that the best interests of the corporation should be read “not simply as the ‘best interests of the shareholder’” and lists governments, the environment, and consumers among other stakeholder interests that directors may consider.<sup>88</sup> As such, *Peoples* endorses the view that Suncor directors may decide whether to fulfil the pledges contained in the Sustainability Report by having regard to the environmental impacts and other extrinsic interests that directors can but are not required to consider pursuant to environmental regulations such as Directive 074.

Finally, *BCE* states that when dealing with conflicting stakeholder interests, directors should consider the concept of responsible corporate citizenship.<sup>89</sup> As one commentator remarked on *BCE*, responsible corporate citizenship is the “hallmark” of fulfilling fiduciary duties.<sup>90</sup> Arguably, this suggests that a responsible corporate citizen would uphold the objectives in a sustainability policy and make best efforts to implement this pledge. A responsible corporate citizen would devise expectations concerning their impacts on the environment, release information with transparency, and set achievable environmental goals. The statements made by a responsible corporate citizen in a sustainability policy would be realistic and based on sober analysis, as opposed to optimistic greenwashing, which is merely hyperbolic corporate advertising.<sup>91</sup>

Thus, from a legal perspective, it appears that fulfilling the pledges contained in the Sustainability Report at the expense of shareholder profit is in keeping with the leading jurisprudence on point from the Supreme Court of Canada interpreting section 122(1) of the *CBCA*. Further, this research suggests that directors are protected from liability when they make a decision aligned with a sustainability pledge that also limits shareholder value. For the reasons cited previously concerning the business judgment rule, directors need only invoke the rule to defend decisions made in good faith that support and preserve commitments to an environmental or sustainability pledge. As such, a profit-driven shareholder cannot hold Suncor directors to account for complying with the Sustainability Report despite the financial losses that may result.

Moreover, one may argue that Suncor has an ethical obligation to press forward with its TRO program given the program’s potential. This decision may affect shareholder profit; however, assuming there is still profit to be had, Suncor directors may balance stakeholder interests between monetary gain and environmental costs. This decision reflects the principle of good corporate citizenship as provided in *BCE*. Still, directors will not be held accountable for failing to adopt or achieve environmental pledges such as adhering to the TRO program.

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<sup>87</sup> Essentially, the business receives its privileges from society: “mainly related to the legally institutionalized corporate personality.... [Therefore,] [s]ociety agrees with this exchange as long as the social benefits exceed the social costs.” Ronald Jeurissen, “Institutional Conditions of Corporate Citizenship” (2004) 53 *Journal of Business Ethics* 87 at 89.

<sup>88</sup> *Peoples*, *supra* note 61 at para 42.

<sup>89</sup> *BCE*, *supra* note 61 at para 82.

<sup>90</sup> Kerr, *supra* note 48.

<sup>91</sup> Miriam A Cherry & Judd F Sneirson, “Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster” (2010) 85 *Tul L Rev* 983.

There is increasing awareness that long-term sustainability initiatives are a good form of corporate risk management. Canadian corporate law has also increasingly accepted this view. In *BCE*, the Supreme Court defines the best interests of the corporation as “the long-term interests of the corporation.”<sup>92</sup> This trend towards long-term thinking coincides with the rise of sustainability pledges among corporations, including Suncor’s Sustainability Report.<sup>93</sup>

Even if the enactment of a corporate sustainability pledge is strictly voluntary or discretionary, prudent directors will insist on having these policies to ensure they meet their fiduciary obligations. From this perspective, sustainability concerns should be promoted to the strategic level of corporate governance.<sup>94</sup> Making sustainability pledges is not an exercise in public relations or greenwashing, but an act that promotes risk management and profit-maximization. This case study suggests that voluntarily steps, such as adopting sustainability policies, will complement directors’ fiduciary duty to address long-term sufficiency and environmental concerns. Both of these goals are valid considerations for directors when exercising their statutory fiduciary duties.

In summary, the Suncor case study illustrates that corporate sustainability pledges do not create legal liability for directors when one considers their statutory fiduciary duties in section 122(1) of the *CBCA*. However, directors acting on behalf of a corporation as a good corporate citizen are legally entitled to follow an environmental pledge in a sustainability report at the expense of shareholder profit.

## 4. CONCLUSION

The findings in this paper indicate that a sustainability pledge does not create legally binding obligations upon corporate directors. Firstly, established case law requires directors to consider the best interests of the corporation, which may include a diverse set of stakeholders’ interests. The *BCE* decision suggests that corporate directors have a legal obligation to make decisions as a good corporate citizen; however, this does not require directors to consider the interests of particular stakeholders. Therefore, a voluntary corporate sustainability pledge does not result in a legal obligation on directors to implement environmental objectives contained in a sustainability pledge. Secondly, directors are shielded from liability when enforcing the objectives contained in a sustainability pledge. While stakeholders may not be empowered to legally hold corporations to account on sustainability pledges, it remains within the discretion of directors to implement the objectives of a sustainability policy when they decide that it

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<sup>92</sup> *BCE*, *supra* note 61 at para 38.

<sup>93</sup> In Canada, corporate sustainability reporting is not mandatory; however, as early as 1998 a study found that sustainable development reporting was up 45% from 1992. David Nitkin & Leonard J Brooks, “Sustainability Auditing and Reporting: The Canadian Experience” (1998) 17 *Journal of Business Ethics* 1499 at 1502. This suggests that corporate sustainability reports may be important for assessing financial, as well as environmental impacts. For an excellent overview on the literature and empirical evidence surrounding this linkage between sustainability and financial performance see Stefan Schaltegger & Marcus Wagner, *Managing and Measuring the Business case for Sustainability: Capturing the Relationship between Sustainability Performance, Business Competitiveness and Economic Performance* (Sheffield: Green Leaf Publishing, 2006).

<sup>94</sup> There is a “sufficient legal basis to compel the reporting” of material environmental information respecting public companies. Aaron Dhir, “Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law” (2009) 47 *Can Bus LJ* 435 at 441.

is in the best interests of the corporation to do so. The Suncor case study demonstrates that corporate directors are not legally required to follow the pledges contained within a sustainability report under current conditions. However, directors who voluntarily choose to follow the pledges in a corporate sustainability policy—to the detriment of short-term profit margins—will be able to do so without incurring liability on account of the business judgment rule.